IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CECIL EMILE DAVIS, Appellant.	No. 35681-3-II UNPUBLISHED OPINION

Van Deren, C.J.—Cecil Davis appeals his conviction for the second degree intentional murder of Jane Louise Hungerford-Trapp. He contends that (1) he received ineffective assistance of counsel, (2) the trial court erred when it denied his motion for a mistrial, and (3) impermissible comments by the State in its closing argument amounted to prosecutorial misconduct. Davis asserts that these errors denied him a fair trial and asks that we reverse his conviction. Finding no error, we affirm.

FACTS

On April 14, 1996, Hungerford-Trapp's body was discovered on a staircase landing in Tacoma. She had suffered trauma indicating that she had been strangled and stomped to death. The evidence at the scene included bloody shoeprints with a unique identifier.

Davis has four brothers and two sisters. At the time of the murder, Davis occasionally

lived at his mother's house with one of his brothers, two of his sisters, and some of his nieces and nephews. In January 1997, police suspected Davis of murdering Yoshiko Couch and Georgia Ahrens. The police interviewed several members of Davis's family during their investigation of the Couch murder.[1] Davis's sister, Lisa Taylor, gave police information that implicated Davis in the Hungerford-Trapp murder. The police also took statements from two of Taylor's children, Lisa Hubley and Miesha Smith, and from Davis's sister, Pearlie Cunningham, and her children, Jessica and Kyllo Cunningham.

Evidence showed that Hungerford-Trapp's face was stomped until her features were unrecognizable and that she was strangled so severely that bones broke in her neck. The autopsy showed that each of these injuries alone was sufficient to cause death. All but one of the nieces and nephews stated that Davis had come home covered with blood on the morning of Hungerford-Trapp's murder and all of the children stated that Davis had later showed them the stairwell where Hungerford-Trapp's body was found and indicated that he killed a woman there. Davis's sister, Pearlie Cunningham, stated that she had seen Davis, or someone resembling Davis, near the murder scene on the morning Hungerford-Trapp was killed. Taylor described the boots that Davis was wearing when he came home covered in blood on the morning of the murder and she later showed the police where to find the boots at her mother's house. Taylor also told police that Davis told her that he killed a woman in the area where Hungerford-Trapp's body was found and related that Davis repeatedly washed his clothes to remove the blood. These 1997 statements

[1]In February 1997, Davis was charged with the first degree aggravated murder of Couch. *See In re Pers. Restraint of Davis*, 152 Wn.2d 647, 668, 101 P.3d 1 (2004). He was convicted and sentenced to death for that murder. *Davis*, 152 Wn.2d at 668-69. On November 4, 2004, the Washington Supreme Court affirmed the guilt phase of Davis's trial but reversed and remanded for new trial in the penalty phase. *Davis*, 152 Wn.2d at 761.

were recorded and transcribed.

When interviewed by police, Davis admitted owning a pair of boots with the unique identifier associated with the bloody shoeprints found at the Hungerford-Trapp murder scene. The police seized boots from Davis's mother's house and sent them to the Washington State Patrol Crime Laboratory where investigators determined that the soles of the boots matched the bloody shoeprints at the scene and where they also found blood traces on the right boot that they suspected were from Hungerford-Trapp. Years later, deoxyribonucleic acid (DNA) tests showed that the probability of finding a random match of the blood on the boots from anyone other than Hungerford-Trapp in the general population was 1 in 840 trillion.

On January 12, 2005, the State charged Davis with the second degree intentional murder of Hungerford-Trapp under RCW 9A.32.050(1)(a). The State agreed to not refer to other incidents that Davis had "been charged with and convicted of or suspected of" at trial. Report of Proceedings (RP) at 389. The parties stipulated to the foundation and authenticity of the tapes and transcripts of the 1997 statements by Davis's family members and agreed that either side could use the statements for any legitimate trial purpose.

Lisa Taylor, Lisa Hubley, Miesha Carter, Jessica Cunningham, and Kyllo Cunningham testified at trial. Each either denied any memory of the substance of their 1997 statements or denied the accuracy of those earlier statements. In response, the State asked each of these witnesses to read highlighted portions of the transcripts of their 1997 statements to the jury. When the State asked Taylor on redirect examination if she had been treated with respect by the detective who interviewed her in 1997, she mentioned a "brother on death row." RP at 710. Davis objected to this answer as non-responsive and unsuccessfully moved for a mistrial, asserting that any mention of Davis having been on death

row was "absolutely forbidden." RP at 712.

During closing arguments, the prosecutor told the jury:

> What [the jury instruction on reasonable doubt] says is that there is a doubt for which a reason exists, and that means, while you're deliberating, if you want to find the defendant not guilty, you need to say I believe he's not guilty. I'm sorry. I doubt he's not guilty. That's what you should say. I doubt he's guilty, and here's why. And you have to fill in that blank.

RP at 1194-95. The State also told the jury that "ten and a half years is a very long time to wait for justice" and "[i]t's been over ten years, and that's a long time." RP at 1197, 1230.

The jury convicted Davis of second degree murder and he was sentenced as a persistent offender to a life sentence "without the possibility of release or parole." Clerk's Papers (CP) at 65.

Davis appeals.

ANALYSIS

Davis makes two related arguments about the evidence of his previous murder conviction and the death sentence imposed for Couch's murder. He contends that (1) his counsel was ineffective for failing to object to the admission of such evidence and (2) the trial court erred in failing to grant his motion for a mistrial when his counsel did object. Davis also contends that the State committed prosecutorial misconduct in closing arguments, asserting that it (1) misstated the standard for reasonable doubt and (2) suggested that Davis was responsible for the ten-year delay between the crime and the trial.

I. Ineffective Assistance of Counsel

To prevail on a claim of ineffective assistance of counsel based on a failure to object, the defendant must show (1) deficient performance, i.e., the absence of a legitimate strategic or tactical reason for not objecting and that the

trial court would have sustained the objection if made, and (2) prejudice, i.e., the result of the trial would have differed if the evidence had not been admitted. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). If Davis fails to satisfy either prong of the ineffective assistance of counsel test, we need not address the other prong. *Hendrickson*, 129 Wn.2d at 78.

We presume that counsel's representation was effective. *Hendrickson*, 129 Wn.2d at 77. The presumption of effective assistance can be overcome by a showing "that counsel's performance fell below an objective standard of reasonableness" and that the challenged actions were not sound trial strategy. "If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel." *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

Davis does not suggest that the State offered evidence of his past crimes as evidence at trial nor does he suggest that the trial court ruled such evidence admissible. Generally, under ER 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Specifically, Davis acknowledges that the State stipulated that no evidence of his previous murder conviction and death sentence would be admitted to show a propensity to commit the murder of Hungerford-Trapp. But he asserts that such evidence was "repeatedly heard" by the jury when his own relatives' testimony suggested a prior conviction and sentence and his counsel failed to object. And Davis argues that witness testimony "le[ft] no doubt in the jurors' minds that Davis had killed before." Br. of Appellant at 24. But Davis is mistaken; the record does not support this contention.

First, Davis points to Lisa Hubley's testimony. Davis cites the following exchange

between the State and Hubley:

> [THE STATE:] Is there any reason, Ms. Hubley, why you would lie to the police about information [that tends to incriminate Davis] to make things worse for your uncle?
> [HUBLEY:] Well, I didn't know anything, it was, like, serious like that. I don't know. Like I said, they didn't straight -- whoever interviewed me didn't say, well, do you know you're down here for a homicide of a lady that was found dead on any stairs. It was nothing like that. When they brought us down here, it was for something totally different.
> [THE STATE:] Okay. The police interviewed you about a separate investigation, right, Ms. Hubley?
> [HUBLEY:] Yes, they did.
> [THE STATE:] And during that interview, the subject changed and you talked about an incident with the woman who was found on the stairs, right?
> [HUBLEY:] Yeah.

RP at 581.

Davis also points to the State's quote from Hubley's earlier transcribed statement that mentioned "another case":

> [THE STATE:] I want you to read the transcript, if you will. Do you see where [the detective], about a third of the way down, says, "I want to switch gears a little bit here and talk about another case." And for the purposes of the tape, he gives the case number and that that's a homicide, April 14th of 1996.
> [HUBLEY:] Yeah.

RP at 584. Lisa Taylor's testimony also included mention of a "different investigation." RP at 634.

But the statements by Hubley and Taylor did not identify Davis as the subject of the "separate investigation," "different investigation," or other "case." These references to other investigations falls far short of evidence offered and admitted to show propensity based on a prior bad act.

Next, Davis points to Jessica

Cunningham's testimony during the following exchange:

> [THE STATE:] Did you realize that, when you were talking to the detectives, it was about serious subject matters?
> [CUNNINGHAM:] No.
> [THE STATE:] Did you think it was a joke that you were down here talking about cases?
> [JCUNNINGHAM:] I mean, then, yeah, it was kind of funny to me.
> [THE STATE:] It was?
> [CUNNINGHAM:] Yeah.
> [THE STATE:] Even though the subject you were talking about was homicide cases?
> [CUNNINGHAM:] Yeah.

RP at 613. Davis also refers to Jessica Cunningham's testimony from her earlier transcribed statement:

> [THE STATE:] When [the detective] said, "And then just -- I want to take you back to April of last year. Did [Davis] tell you about having killed some woman?" What was your response?
> [CUNNINGHAM:] "The one where he was drenched in blood?"

RP at 618-19. Davis further objects to the State quoting the detective who interviewed Miesha Smith when he asked her whether Davis "had made some comments to [her] about another murder." RP at 656. Similarly, Davis argues that specific references to a murder that took place on the stairs, as opposed to elsewhere, suggest that other murders were under investigation.

Finally, Davis focuses on the testimony of Lisa Taylor. At trial, Taylor denied making the earlier recorded and transcribed statements, asserted that the tape was "doctored," and suggested that the police could have planted the blood evidence on the boots. RP at 701. She refused to read her earlier transcribed statement and claimed that she was unable to do so because her reading glasses were at home. When the State asked the trial court to recess and order Taylor to get her glasses, she asserted that the police had "raided" her house and broken her glasses. RP at

641. The State had a stand-in witness read from Taylor's earlier statement.

When Taylor resumed testimony under cross-examination, the following exchange occurred between defense counsel and Taylor:

> [DEF. COUNSEL:] Were there discussions that you recall having with the police officers other than on this occasion?
> [TAYLOR:] No, because officers was coming back and forth.
> [DEF. COUNSEL:] Okay. So you might have talked to them before this?
> [TAYLOR:] No, at the police station.
> [DEF. COUNSEL:] Okay. Oh, when the night when you were all down?
> [TAYLOR:] Yeah, and one day, too, I had to go down there.
> [DEF. COUNSEL:] Okay.
> [TAYLOR:] They picked me up one day. I don't know where they picked me up from. I don't know for sure, but it wasn't like they was telling -- I was begging for them to come on, come on, let me tell you something about my brother. Why would I do that? And I love my mother.
> [DEF. COUNSEL:] Did they tell you anything, what they thought about your --
> [TAYLOR:] Yeah, they had pictures of stuff on the table. There was -- had a yellow envelope. When I wasn't saying what they wanted me to say, they will get me back to another subject, left the pictures on the table, walk out. I can prove to you this. They had Ms. Georgia's pictures on the table. How would I know the way she was when I wasn't there? And then nobody said about how she passed away at her trial, so how would I would have known about her head being put between the head --
> THE COURT: Excuse me. We need to stick to the subject.
> [DEF. COUNSEL:]: I understand.
> [DEF. COUNSEL:] So you did talk to the police other than what's on that written page, right?
> [TAYLOR:] Yes.

RP at 706-07. Nothing in this statement identifies Davis as the subject of the discussion. In fact, Taylor's statement was that a person "passed away at her trial." The common meaning of such a statement would generally exclude homicide. Moreover, the record shows that the trial court immediately refocused the cross-examination.

Davis asks us to assume that the jury inferred improper propensity evidence from these various statements. But quoting from recorded recollections, suggesting that the police were investigating multiple murders, is not inadmissible propensity evidence of Davis's prior bad acts offered by the State or admitted by the trial court. And Davis's bare assertion that "[t]here is no doubt objections would have been sustained," is unsupported by the record, particularly in light of the parties' stipulation to use of the prior recorded statements at trial. Br. of Appellant at 26.

Furthermore, trial counsel's decision about whether to object is a classic example of trial tactics and only in egregious circumstances relating to evidence central to the State's case will the failure to object constitute ineffective representation that justifies reversal. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). Here, Davis's defense counsel's tactical decision to withhold a peripheral objection that would further focus the jury's attention on testimony about other cases does not constitute ineffective assistance of counsel.

Finally, the State's evidence showing that Davis intentionally murdered Hungerford-Trapp was overwhelming. The evidence showed that Davis returned to his mother's house on the morning of the murder with his clothing turned inside out "drenched in blood," RP at 619, that he discussed stomping a woman to death with his sister and his pre-teen and teenage nieces and nephew, that he told them that "he killed him a bitch," "stomped her and choked her," and that "he had to kill some crack-headed white bitch." RP at 595, 620, 696. Other evidence showed that he later pointed out the stairwell where Hungerford-Trapp's body was found and told some of these same witnesses that "[h]ere's where it all happened," RP at 661, and that the soles of his boots matched the bloody footprints at the scene of Hungerford-Trapp's murder. Later DNA tests produced strong statistical evidence that Hungerford-Trapp's blood was on Davis's right

boot as well.

In light of the State's overwhelming evidence against Davis, he cannot show prejudice from his counsel's failure to object to the identified testimony. His claim of ineffective assistance of counsel fails.

II. Motion for Mistrial

Davis also focuses on Lisa Taylor's testimony to support his contention that the trial court abused its discretion when it denied his motion for a mistrial. On redirect examination, when the State asked Taylor if she had been treated with respect by the detective who interviewed her in 1997, she responded:

> How, when you take me and my mama and my nieces and nephews down to the police station, had us out there until 2 or 3 o'clock in the morning. You know, little kids, and you all questioning everybody without a lawyer being there, you know, and then you made all these leads. Ten, eleven years old. You know, you guys know better than that. And then to put my brother on death row for this stuff.

RP at 710. Davis objected to this answer as non-responsive and unsuccessfully moved for a mistrial, asserting that any mention of Davis having been on death row was "absolutely forbidden." RP at 712.

Davis argues that Taylor's response, combined with the other references to another homicide investigation, made it clear to the jury that Davis "had been investigated, convicted, and sentenced to death for another murder." Br. of Appellant at 31-32. And he contends that the prejudicial effect of these statements "denied his right to a fair trial" and that "[w]ithout the offending evidence, jurors may have acquitted [him] or convicted him of first-degree manslaughter." Reply Br. of Appellant at 7-8.

We review a trial court's denial of a motion for a mistrial for an abuse of discretion. *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). "An appellate court finds abuse only 'when no reasonable judge would have reached the same conclusion.'" *Hopson*, 113 Wn.2d at 284 (quoting *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 667, 771 P.2d 711 (1989)). A mistrial should be declared only when the defendant has been prejudiced by an error affecting the outcome of the trial and nothing short of a new trial can cure the irregularity. *See, e.g., Hopson*, 113 Wn.2d at 284. "In determining the effect of an irregularity, we examine (1) its seriousness; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it." *Hopson*, 113 Wn.2d at 284.

Davis argues that suggesting that these statements were inherently prejudicial "is a vast understatement." Br. of Appellant at 32. And he further asserts that the inference that he was a convicted murderer on death row was key to his conviction because "no one saw Davis associate with Hungerford-Trapp, no one saw her murder, Davis consistently denied the killing, and his family members largely disavowed their 1997 statements to police." Reply Br. of Appellant at 6-7. But both the State and Davis agreed before trial that the 1997 statements could properly be put before the jury, and the State presented other overwhelming evidence of Davis's intent to murder Hungerford-Trapp and of his guilt. Thus, the import or impact of the testimony to which Davis objects pales when viewed in light of the totality of the evidence before the jury.

Davis also argues that the objected-to testimony as a whole was clearly prejudicial. He asserts that (1) "every member of this jury w[ould have had to be] an ignoramus" to fail to conclude that the police were investigating more than one homicide; (2) it would require jurors with "diminished capacities" to conclude that Davis was not the subject of that investigation; and (3) "[t]he only logical conclusion" jurors could

have made was that Davis was on death row for another murder. Reply Br. of Appellant at 3-4.

But the jury knew that Lisa Taylor had five brothers and she specifically mentioned at the beginning of her testimony that two of her brothers, Cecil Davis and "Audie," both occasionally lived at her mother's house. RP at 634. Her later reference to a brother on death row could have referred to any of her other brothers. That testimony, being unresponsive to the question asked, may have been perceived as a "rant" or "hyperbole," as the trial court concluded. CP at 68-69. Moreover, the record supports the trial court's finding that, until Taylor testified, there was no specific mention of Davis and even Taylor did not refer to Davis by name.

Finally, after Davis objected and moved for a mistrial, the State agreed to a curative instruction and the trial court, after denying Davis's motion for a mistrial, specifically agreed to give a curative instruction should Davis wish to propose one. But Davis declined to propose a curative instruction, stating that he did not want to bring further attention to the testimony. And "[r]eversal is not required if the error could have been obviated by a curative instruction which the defense did not request." *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). *See State v. Lord*, 161 Wn.2d 276, 291, 165 P.3d 1251 (2007) ("A defendant generally cannot decline to ask for a mistrial or jury instruction, gamble on the outcome, and when convicted, reassert the waived objection.").

The trial court, in denying Davis's motion for mistrial, noted that: (1) the State informed the trial court that the family members would likely be hostile witnesses; (2) a record was made showing that each of the family members was instructed that there was to be no mention of any other case involving Davis; (3) the State used the phrase "different investigation" or similar words only to establish the reason the witness was talking to the police in the first place; (4) Lisa Taylor was specifically instructed by the trial court out

of the presence of the jury not to mention other crimes Davis was charged with or suspected of committing; (5) the State did not elicit Taylor's statement about her brother on death row and her answer was unforeseeable from the question asked; and, (6) even though Davis declined to request a curative instruction, the trial court considered a related limiting instruction "but ultimately decided against that course of action." CP at 67-68.

For purposes of appellate review only, the trial court found that Taylor's behavior on the stand "likely had a negative impact on her credibility with the jury" and, therefore, "the jury [would] likely consider Ms. Taylor's unsolicited remark . . . to be hyperbole rather than true." CP at 69. Finally, the trial court found that the State presented overwhelming evidence of Davis's guilt and "when Ms. Taylor's brief and unsolicited comment is considered under the totality of the circumstances, including taking it in the context of her entire testimony, and in the context of the entire trial, and in conjunction with the entirety of the evidence presented, the court finds that the comment could not have any effect on the jury in deliberating this case." CP at 69.

We agree with the trial court's reasoning and hold that, based on the record before us, the trial court did not abuse its discretion in denying Davis's motion for a mistrial.

III. Prosecutorial Misconduct

Davis contends that the State's explanatory slide and accompanying comments in closing argument confused the jury about the definition of reasonable doubt and, further, that the State indicated that Davis was responsible for delayed justice. Davis argues that these errors constituted prosecutorial misconduct and denied Davis his right to a fair trial.

On appeal, Davis bears the burden of showing that the conduct complained of was both improper and prejudicial. *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). Even if Davis can show that the State's remarks were

improper, prejudicial error will be found only if we determine that there is a substantial likelihood the improper remarks affected the jury's verdict. Where, as here, the defendant fails to object or to request a curative instruction, the error is considered waived "unless the remark is deemed so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *Stenson*, 132 Wn.2d at 719. Thus, an "improper prosecution argument, even when indirectly touching upon a constitutional right, is tested by whether the prosecution argument is so flagrant and ill-intentioned as to create incurable prejudice." *State v. French*, 101 Wn. App. 380, 385, 4 P.3d 857 (2000).

But if the alleged misconduct directly violates a constitutional right, as Davis asserts, we review it under the stricter standard of constitutional harmless error. *French*, 101 Wn. App. at 386. Here, Davis does not contend that the jury instructions misstated the reasonable doubt standard.

In *Victor v. Nebraska*, 511 U.S. 1, 5, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994), the United States Supreme Court explained that the "beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so." Therefore, at most, Davis's alleged prosecutorial misconduct only indirectly touches on a constitutional right. Thus, we review both of Davis's contentions under the flagrant and ill-intentioned standard. *French*, 101 Wn. App. at 386.

A. Reasonable Doubt

For the first time on appeal, Davis asserts that the prosecutor committed misconduct during closing argument and shifted the burden of proof to him by misstating the definition of reasonable doubt. During closing argument the prosecutor displayed a series of projected slides for the jury. Two of the slides addressed the

definition of reasonable doubt. One slide showed the definition of reasonable doubt from the standard jury instruction.

> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP at 254. This definition of reasonable doubt is taken verbatim from 11 Washington Practice: Pattern Jury Instructions: Criminal (WPIC) 4.01, at 79 (2d ed. supp. 2005). WPIC 4.01 has been approved by the Washington Supreme Court. *See State v. Bennett*, 161 Wn.2d 303, 309, 165 P.3d 1241 (2007) ("WPIC 4.01 has been approved by several courts.").

The second slide was apparently drafted by the deputy prosecutor and read:

> WHAT IT SAYS
> A doubt for which a reason exists.
> In order to find the defendant not guilty, you have to say:
> "I doubt the defendant is guilty, and my reason is _____."
> And you have to fill in that blank.

CP at 254.

On appeal, Davis contends that the State "destroyed the presumption of innocence." Br. of Appellant at 41. But the State, during this portion of the closing argument, said:

> *The burden of proof in a criminal case is beyond a reasonable doubt. It is the highest burden that we put on any party in a court of law. It's a burden that the State accepts, and it's a burden that the State has met and exceeded in this case. The instruction that defines reasonable doubt is Instruction Number 2 in your packet, and you can read it there on the screen. That is an instruction that is very important for what it says and also for what it does not say. What it says is that there is a doubt for which a reason exists, and that means,* while you're deliberating, if you want to find the defendant not guilty, you need to say I believe he's not guilty. I'm sorry. I doubt he's not guilty. That's what you should say. I doubt he's guilty, and here's why. And you have to fill in that blank.

RP at 1194-95 (emphasis added).

Davis acknowledges that this portion of the prosecutor's closing argument was so sufficiently unremarkable that his trial counsel did not object. Because Davis failed to object to the slide or to request a curative instruction, the error is considered waived "unless the remark is deemed so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *Stenson*, 132 Wn.2d at 719. Although a question could arise regarding the propriety of the slide and that portion of the prosecutor's argument purporting to explain the definition of reasonable doubt, the record does not convince us that the prosecutor's statement and slide was so flagrant or ill-intentioned that an admonition, if requested, would not have neutralized the matter.

We note that the deputy prosecutor skirted dangerously close to shifting the burden of production to the defendant with his slide that advised the jury that "[i]n order to find the defendant not guilty, . . . you have to fill in" a blank with a reason. CP at 254. But, on the record before us, the overwhelming evidence of Davis's guilt—the DNA evidence, verbal admissions by Davis to his family, and autopsy report—convince us beyond a reasonable doubt that error, if any, was harmless. *See State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985) ("A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error.").

B. Delayed Justice

Davis also contends that the State impermissibly "implied that Davis was somehow responsible for the ten-year delay in the case." Davis argues that the State, "[s]ensing that jurors could hold the delay against the State, . . . decided to use that delay to [its] advantage." Br. of

Appellant at 38.

During closing arguments, the State, while showing the jury pictures of Hungerford-Trapp, told the jury that:

> That's Jane Hungerford-Trapp on April 12th of 1996. And that's Jane Hungerford-Trapp after the defendant was through with her.
>
> It's November 2nd, 2006, and ten and a half years is a very long time to wait for justice. But justice is finally here, justice not only for Jane Hungerford-Trapp. Justice for Cecil Davis.

RP at 1197.

A few moments later, the State concluded its closing argument with the following statement:

> When you were first formally seated as a jury group for this group and you were formally sworn, you all took an oath. You took an oath to render a true verdict in this case, and now it's the time to do that. Now it's judgment day for the defendant. The evidence in this case is overwhelming that the defendant killed Jane Hungerford-Trapp sometime April 13th, early morning hours of April 14th, 1996. It's been over ten years, and that's a long time.
>
> The State would ask you to return a verdict that holds the defendant accountable for what he did on that stairwell back in 1996. I would ask you to return a verdict that speaks the truth, that the defendant is guilty of murder in the second degree. Thank you.

RP at 1229-30.

First, we find nothing in these portions of the State's closing argument that amounts to an impermissible comment. In fact, ten and one-half years had elapsed between the date of death and that closing argument. Second, in view of the overwhelming evidence of Davis's guilt, it is highly unlikely that the comment affected the jury's verdict. Finally, Davis again did not object and any error is considered waived "unless the remark is deemed so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition

to the jury." *Stenson*, 132 Wn.2d at 719.

Davis's argument seems to be that, because the State was responsible for the delay because the State failed to charge Davis earlier, the very mention of the delay evidenced the State's ill intent. But the record shows that the State merely urged the jury to hold Davis responsible for the ten-year old murder of Hungerford-Trapp. Thus, the State's comments on delayed justice were not improper and this contention of prosecutorial misconduct is without merit.

We affirm Davis's conviction.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, C.J.

We concur:

Bridgewater, J.

Quinn-Brintnall, J.